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BEFORE THE

Federal Communications Commission

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WASHINGTON, D. C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 11 and 13)
 of the Cable Television Consumer)
 Protection and Competition)
 Act of 1992)

MM Docket No. 92-264

Horizontal and Vertical Ownership)
 Limits, Cross-Ownership Limitations)
 and Anti-Trafficking Provisions)

To: The Commission

REPLY COMMENTS OF PAY-PER-VIEW NETWORK, INC.
 D/B/A VIEWER'S CHOICE

Pay-Per-View Network, Inc. d/b/a Viewer's Choice ("Viewer's Choice"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits its reply comments in response to the comments filed in the above-captioned proceeding.

The record compiled in response to the Commission's Further Notice of Proposed Rulemaking¹ demonstrates that adoption of the broadcast ownership attribution criteria for the purpose of cable channel occupancy limits and the inclusion of pay-per-view ("PPV") channels in the determination of channel occupancy limits will be detrimental to the development and continued growth of

¹ In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 93-332 (rel. July 23, 1993) ("FNPRM").

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PPV video services. In the end, the cable subscriber will suffer the consequences of adopting these two positions. Contrary to the intent of Congress to empower the consumer with the flexibility of choosing video programming from a broad selection of diverse programming sources at the consumer's convenience, low attribution standards and limitations on the cable channel capacity available to PPV programming will only deprive the consumer of this flexibility. Accordingly, the channel occupancy limitations embodied in the final rules should exclude PPV services, establish ownership attribution criteria more attuned to the underlying purposes of the rules and establish grandfathering provisions that appropriately recognize the realities of cable programming arrangements.

Treatment of PPV Channels

Viewer's Choice continues to urge the Commission to defer any decision on the treatment of PPV channels with respect to the channel occupancy limits of vertically integrated cable operators. To include PPV in the channel calculations now will impair the growth of PPV and penalize those PPV programmers, such as Viewer's Choice, that have recently converted their transmission systems to digital compression. Time Warner Entertainment Company ("Time Warner") and the National Cable Television Association (the "NCTA") share these concerns.²

²

Of those who addressed the treatment of PPV, only the Motion Picture Association of America ("MPAA") agrees with the Commission's proposal to count PPV programming towards channel occupancy limits. Comments of MPAA at p. 9. MPAA
Continued on following page

Although the NCTA attempts to draw distinctions among three models of PPV offerings, a "network" model, a direct license model and a local origination model, Viewer's Choice submits that the distinctions are not clear at all. For instance, cable operators might choose to combine all three models to create a totally different type of PPV service. In light of the blurring of the distinctions and the still evolving nature of PPV services, Viewer's Choice concurs with the NCTA's "better solution", which is to exempt all PPV programming from channel occupancy limits.³ Viewer's Choice agrees with the NCTA that such an exemption "will facilitate the continued growth of pay-per-view and similar on-demand technologies . . . consistent with the Congressional mandate that the Commission's implementation of channel occupancy limits not 'impair the development of diverse and high-quality video programming'."⁴

Ownership Attribution Criteria

Viewer's Choice continues to support an attribution standard for purposes of channel occupancy limits that is based on control. Time Warner, the NCTA and Liberty Media also advocate an attribution standard based on control. Other parties, such as MPAA, Rainbow Programming Holdings and Tele-Communications, Inc.,

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simply states its position and fails to explain or justify how its position advances the underlying goals of the 1992 Cable Act.

³ Comments of the NCTA at p. 23.

⁴ Id. at p. 23. See also 47 U.S.C. § 533(f)(2)(G).

advocate attribution standards of 10% to 25%, significantly higher than the broadcast attribution criteria that the Commission proposed.⁵

As Viewer's Choice and others have shown, the broadcast attribution criteria are not appropriate for purposes of channel occupancy limits. Furthermore, such attribution criteria will curtail the necessary investment by cable operators, even non-concentrated minority investments, which have brought and will continue to bring new innovative programming services to cable subscribers.

Grandfathering Existing Carriage Arrangements

The Commission proposes to grandfather "all vertically integrated programming services that were carried" as of the effective date of the 1992 Cable Act which exceed the channel occupancy limits eventually adopted.⁶ The Commission also states that it is grandfathering "existing vertical programming relationships."⁷ Viewer's Choice requests that the Commission clarify the ambiguity between programming that is actually carried as opposed to existing programming arrangements. Furthermore, Viewer's Choice proposes that the grandfather date

⁵ Only the Community Broadcasters Association and Black Entertainment Television support adopting the broadcast attribution criteria, and apparently Turner Broadcasting System continues to support the position it advocated in its original comments in this proceeding.

⁶ FNPRM at ¶ 236.

⁷ Id. at ¶ 237.

should be the effective date of the Commission's rules adopted pursuant to the FNPRM.

Typically, video program suppliers have arrangements with cable operators which provide options for the operator to carry additional programming from the supplier as it becomes available and as the operator's channel capacity expands. This is particularly true with PPV programmers. In recognition of these arrangements, the Commission's grandfathering should encompass not only the programming which cable operators are carrying, but also the programming which they have secured rights to carry (and thus planned for) under their existing programming arrangements.

Moreover, in light of the general, nonspecific language of the 1992 Cable Act, video programmers and cable operators have been operating in a cloud of uncertainty with respect to channel occupancy limits since enactment of the 1992 Cable Act. Therefore, the Commission should not penalize vertically integrated programmers and cable operators for actions taken prior to the date that the channel occupancy limits were better defined. To avoid such a penalty, the Commission should grandfather programming arrangements in effect on the effective date of the definitive rules adopted pursuant to this FNPRM.


CONCLUSION

For the foregoing reasons, the Commission should (1) exempt PPV services from the channel occupancy limits; (2) adopt an ownership attribution standard for purposes of channel occupancy limits which is based on control; and (3) grandfather existing programming arrangements (not simply programming which is actually carried) as of the effective date of the rules adopting the Commission's channel occupancy limits.

Respectfully submitted,

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D/B/A VIEWER'S CHOICE

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CERTIFICATE OF SERVICE

I, Rebecca S. Catelinet, hereby certify that a true and correct copy of the foregoing Reply Comments of Pay-Per-View Network, Inc. d/b/a Viewer's Choice was sent this 3rd day of September, 1993 by first-class mail, postage prepaid to the following:

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